United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT FRANKLIN E. MOYLER

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In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

FRANKLIN E. MOYLER,
Appellant,

v. No. 19,910

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

Whether the District Judge erred in refusing to instruct the jury that the use or threat of force by the appellant was an essential element of the felony -- "Assault on Member of Police Force" (D.C. Code, § 22-505a);

Whether the District Judge erred in instructing the jury solely in the words of the statute and not explaining in language understandable to the jury the elements of the crime charged; and

Whether it was plain error for the District Judge to permit the prosecution to dilate upon a brutal crime that preceded the alleged assault and in which appellant was not a participant, and to allow the jury to consider such evidence without a cautionary instruction.

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JURISDICTIONAL STATEMENT

The appellant was indicted on two counts charging Assault on a Member of the Police Force (D.C. Code § 22-505a). He plead not guilty and after trial by a jury was convicted on one count and acquitted on the other. Thereafter he was sentenced to imprisonment for a period of 15 months to 45 months. The District Judge authorized prosecution of this appeal without prepayment of costs and this Court directed preparation of the transcript of the trial proceedings. Jurisdiction is based on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

In the early morning of July 4, 1965, two officers of the District of Columbia Metropolitan Police Department, Chaillet and Catalano, on duty in a police cruiser were engaged in arresting one Philpot who had been observed by the officers in the act of beating and robbing a man named Daughtry. (Tr. 17, 37) A group of some 12 to 15 youths who had been loitering nearby gathered round the scene and jeered at the officers' efforts. (Tr. 17-18, 37-38, 128) While Chaillet sought to handcuff Philpot the other officer warned the group to stand clear (Tr. 18); there is conflict in the testimony as to whether he had gun in hand while

issuing such warnings. (Tr. 26, 46, 80-81, 133, 138) The appellant was the only member of the onlooking group known to and recognized by the officers. (Tr. 45, 50) Catalano, calling appellant by his nickname, Geno, warned him that they wanted no trouble from him. (Tr. 60) There was no evidence that appellant or any other member of the group carried a weapon.

A member of the group broke through and jumped Officer Chaillet from the rear. (Tr. 18, 38) Both Philpot and the assaulter escaped after a minor skirmish with the officers and were not apprehended that morning. Immediately following the assault the officers chased the appellant into a nearby house but failed to apprehend him. (Tr. 29, 93-95) The officers went on to a hospital where Chaillet received attention for minor injuries and was released; the other officer suffered damage only to his clothes. (Tr. 19, 41) Subsequently a warrant was sworn out for appellant and he was arrested some two months later on September 7, 1965.

At trial the appellant, testifying in his own defense, admitted that he was present at the time of the alleged assault (Tr. 60-61, 77), that he had seen both of the officers earlier in the evening (Tr. 76), and that Catalano had cautioned him by name while Chaillet was attending to Philpot. (Tr. 60) He denied that he had

assaulted Chaillet and stated that he had begun to move away from the scene prior to the assault in accordance with Catalano's warnings. (Tr. 60-61, 88-89) Appellant's testimony as to his non-participation in the assault upon Chaillet was corroborated by one Miller, another member of the onlooking group, who testified that a person unknown to him had assaulted Chaillet. (Tr. 106, 131-132) The victim of the robbery and beating, Daughtry, testified but did not identify the assailant of Officer Chaillet. (Tr. 10-14) The two police officers testified that it was appellant who jumped Chaillet while he was effecting the arrest of Philpot. (Tr. 20, 38-39)

The jury was thus faced with a conflict in the testimony of the two officers on the one hand and appellant and Miller on the other as to whether it was appellant, or someone else, who had jumped Officer Chaillet. The District Judge overruled appellant's request that some physical contact between the appellant and the officer must be established before the appellant could be found guilty of the crime charged -- Assault upon a Member of the Police Force. (Tr. 147-148) The theory upon which this request rested was that the only person guilty of the crime charged was the person who jumped Officer Chaillet; unless the jury was satisfied beyond a reasonable doubt that appellant was that person, he could not be found guilty. The District

Judge, however, repeatedly charged the jury that to find the appellant guilty they need only find, in the words of the statute, that he had either assaulted or resisted, or opposed, or impeded, or intimidated, or interfered with the two officers. (Tr. 166-168) No effort was made in the charge to give content to any of the words in the statute. In addition, the District Judge permitted the prosecution to lay before the jury both in cross-examination and in closing all of the gruesome details of the crime committed by Philpot, who was a friend of appellant, and failed to caution the jury that none of such evidence had anything to do with appellant's guilt. (Tr. 14, 81, 83, 126, 129, 149)

STATUTES AND RULES OF CRIMINAL PROCEDURE INVOLVED

District of Columbia Code, Title 22 - Criminal Offenses:
Chapter 5. Assault -- Mayhem -- Threat of Bodily Harm.

§ 505 "ASSAULT ON MEMBER OF POLICE FORCE.

> (a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both."

Rule 52(b) of Federal Rules of Criminal Procedure:

> "HARMLESS ERROR AND PLAIN ERROR . . .
>
> (b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT OF POINTS

1. The appellant was charged with a serious crime of violence -- Assault on Member of Police Force -- of which use or the threat of force is an essential ingredient. The evidence was undisputed that a member of the police force had been assaulted, but in conflict as to whether the attack was committed by appellant or by some other member of the group of onlookers present. As a result of the refusal of the District Judge to instruct the jury that use or a threat of force was an essential element of the felony charged, the jury could have convicted the appellant even though they were not satisfied beyond a reasonable doubt that he was the person who had actually attacked the police officer, simply because he was vigorously remonstrating against the officers in the performance of their duty.

2. Quite apart from his failure to recognize force as an essential element of the felony charged, the District Judge erred in failing to explain to the jury the elements of the crime charged in language other than that used in the Criminal Code. This failure of the District Judge to give the jury guidance in its effort to comprehend the meaning of a complex statute constitutes reversible error.

3. The lurid details of a brutal robbery with which appellant had no connection were presented to the jury throughout the trial and in the prosecution's closing statement. The victim of this robbery testified and the evidence disclosed that the person guilty of the crime, a friend of the appellant, had escaped. All of these details were highly inflammatory and seriously prejudicial to the appellant. The failure of the District Judge to restrict the prosecution and his subsequent failure to caution the jury against being influenced by this evidence and to make clear that appellant had no responsibility for the crime, constitute plain error affecting substantial rights that requires reversal even though not brought to the attention of the District Judge.

SUMMARY OF ARGUMENT

Appellant was tried for assault on two police officers. The evidence was uncontradicted that one of the officers was attacked from the rear while attempting to handcuff a felon and that the appellant was present at the scene standing among a group of several youths who were jeering at the officers. There was conflicting evidence

as to whether the defendant was the person who made the attack upon the officer. The District Judge's charge did not spell out to the jury that the appellant could not be found guilty of the felony charged for merely participating in the vocal remonstrances and that he could be convicted only if he had himself accosted the officer. It is clear that the legislature intended such a limitation on the scope of the crime. This is evidenced by both the language and structure of the D.C. Code and confirmed by the legislative history and the cases which have applied this and similar statutes elsewhere. It was prejudicial error to issue instructions to the jury which did not identify these minimal elements.

Even if it be determined that the use or threat of force is not an essential element of the crime -- Assault on Member of Police Force -- the instruction delivered was so inadequate and unilluminating as to require reversal. The charge was barren of any description of the meaning and scope of the statute in terms understandable to the jury. The jury was given no guidance in applying the words "impede", "oppose", "resist", etc. and was thus forced to make, rather than to apply, the law. The courts have uniformly held that a conviction must be reversed where the jury's comprehension of the applicable law is in doubt.

The prosecutor laid great stress in examination and in argument on the revolting nature of a robbery committed by one Philpot, a friend of appellant, emphasizing the severity of the wounds inflicted on his bleeding victim. The District Judge should have recognized this matter as largely irrelevant and highly prejudicial and limited reference to the bare details necessary to show that the officers were engaged in performing their duty. Having failed in that, the District Judge should have issued cautionary instructions directing the jury that none of such evidence went to establish appellant's guilt. There can be no doubt that this infammatory material presented in raw form, without guidance from the District Judge, seriously prejudiced appellant and affected his substantial rights. Accordingly, the action of the District Judge was plain error requiring reversal under Rule 52(b).

ARGUMENT

I. The District Judge Erred in Refusing to Instruct the Jury that the Use or Threat of Force was an Essential Element of the Felony Charged.

With respect to Point I, appellant desires the court to read the following pages of the reporter's transcript: 20, 37-38, 62, 88-89, 106, 128, 146-148, 166-168.

A. Force is an Essential Element of the Felony -- Assault on Member of Police Force.

That force or a threat of force is an essential element of this felony is evidenced first by the structure and language of the criminal code provisions. Section 22-505 is the fifth of eight crimes defined in Chapter 5 of Title 22 of the District of Columbia Code. The title of the chapter establishes its exclusive concern with crimes of force and violence: ASSAULT-MAYHEM-THREAT OF BODILY HARM. Without more, it seems unlikely that the Congress would have elected to include a non-violent crime within this chapter, each other constituent of which requires force or threat of force.

The descriptive titles contained in the various sections of Chapter 5 fully support this conclusion. The first five and the eighth sections are identified by their

titles as sundry forms of criminal "assault".*/ The appellant has been convicted under the fifth of these sections. The essence of this crime is suggested by its title which describes both the kind of violative conduct and the protected class: § 22-505. Assault on Member of Police Force.

Selection of the term "assault" to describe this crime cannot be dismissed as a fortuitous choice of words. Criminal assault is a common law crime. One universally recognized ingredient of the crime of criminal assault is the requirement of force. See 1 Anderson, Wharton's Criminal Law and Procedure, §§ 329-336 (1957). Criminal assault in the District of Columbia is indeed "common law assault"; it requires:

> "an attempt with force or violence to do a corporeal injury to another; and may consist of any act tending to such corporeal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability of using actual violence against the person." See Guarro v. U.S. 99 U.S. App. D.C. 97, 99, 237 F.2d 578, 580 (D.C. Cir. 1956), citing Patterson v. Pillans, 43 App. D.C. 505, 506-7 (1915).

Neither the annotations to the District of Columbia Code nor the District of Columbia Digest discloses any case applying this section where force has not been present.

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*/ The other two sections are: § 22-506. Mayhem or Malicious Disfiguring; § 22-507. Threat to do Bodily Harm.

The description of a common law crime by its common law name evidences a legislative intent to receive the whole of that crime, including its elements at common law. Byrd v. U.S., 119 App. D.C. 360, 342 F.2d 939 (D.C. Cir. 1965); Neufield v. U.S., 73 App. D.C. 174, 118 F.2d 375 (D.C. Cir. 1941). In the absence of express contrary language the uniformly endorsed requirement of force should not be read out of a crime which the Congress has explicitly defined as a species of assault.

The Court of Appeals for the Fourth Circuit fixed on factors similar to those stressed by appellant when presented with the problem of construing the Federal statute relating to assault upon Federal officers.*/ That statute provides:

> "whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person . . . shall be fined not more than $5,000 or imprisoned not more than three years, or both."
> Act of June 25, 1948, c. 645, 62 Stat. 688, U.S.C. Title 18 § 111.

The question presented was whether "forcibly" modifies only the verb "assault" or all six verbs. The court concluded that only the latter construction would give this section a meaning consistent with the adjoining portions of the Code. It was observed that Section 111 was "one of the sections under Chapter 7 of the

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*/ Long v. U.S., 199 F.2d 717 (1952).

Criminal Code headed 'Assault' and that the other sections of the chapter relate to assault. . . ."*/ Additionally, each of the neighboring provisions outlines crimes requiring force. The court stressed that this fact bears heavily on traditional patterns of statutory construction: "Such grouping of the section with others defining crimes in which force is a necessary element is not without significance. Noscitur a sociis." The court was further persuaded by the fact that no convictions were reported under the federal act where force was not present. The appellant contends that each of these factcrs dictates that the District of Columbia Criminal Code be similarly construed.

The District of Columbia statute differs from the federal statute in that the verbs included in the D.C. Code are modified by the qualifying phrase "without justifiable and excusable cause," and the adverb "forcibly" is omitted. The legislative history of the statute provides no basis for contending that the language was deliberately selected in order to expand the crime to include non-forceful acts. The present § 22-505 was preceded by a misdemeanor provision outlawing the "use of personal violence" on a police officer.**/ In 1951 this

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*/ 199 F.2d at page 719.

**/ R.S.D.C. § 432.

section was revised in committee to a form nearly identical with the federal statute. The section was not intended to apply to "remarks or disturbances" if not "accompanied by some show of force."*/ This provision was approved by the House in 1951 but not acted upon by the Senate. The entire act was reconsidered in the same form by committees in both houses in 1953; joint hearings were conducted at that time. Of the numerous expert witnesses testifying none expressed -- as indeed no one had expressed at any previous hearing -- criticism that the proposed language was drawn too narrowly or that non-forceful acts should be included. On the contrary each of the witnesses who testified on what became § 22-505 urged that the language be altered to restrict the scope of the statute.**/ Two of the witnesses specifically urged that the verbs contained in the statute be modified by language providing a defense for assault with "justifiable and excusable cause."***/ It is significant that

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*/ Hearings Before the House Committee on the District of Columbia, 82d Congress, 1st Sess. on H.R. 3586, 42 (1951).

**/ See the Testimony of Leo Rover, United States Attorney for the District of Columbia; Mr. Samuel Spencer, Commissioner for the District of Columbia accompanied by Vernon West, Esq., Corporate Counsel; and Richard Atkinson, Chairman of the Legislative Committee, the Washington Bar Association, testifying before the Joint District Committees 83d Cong., 1st Sess. pursuant to H.R. 420 (1953).

***/ See the Testimony of Mr. Rover at pp. 44-45 and the Testimony of Mr. Spencer at p. 58.

the only change which was made subsequent to these hearings was the substitution of the modifying language "whoever without justifiable and excusable cause assaults . . ." in place of "whoever forcibly assaults." H.R. 5314 emerged from these hearings and passed both houses. The final reports issued by both the Senate and the House Committees altogether ignore the omission of the word "forcibly" in the final draft. The purpose of the new section, according to these reports, was merely to step up the punishment for assault on police officers from a misdemeanor to a felony, and to provide more severe punishment for assault with a dangerous weapon.*/

This legislative history shows that the substitution of the present modifying language does not represent a deliberate attempt on the part of Congress to materially expand the scope of the crime. Throughout the many months that the section was under consideration no one advocated expanding the crime to include non-forceful conduct and no one objected to the use of the word "forcibly" on the ground that the crime should be rewritten to include non-forceful demonstrations. In upgrading the crime to a felony it would be wholly unlikely for the Congress to expand it sub silentio to include conduct that was not even

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*/ H.R. Rep. No. 514, 83d Cong., 1st Sess., 6 (1953); S. Rep. No. 364, 83d Cong., 1st Sess., 6 (1953).

proscribed by the previous misdemeanor statute. Additionally, there is no credible reason why Congress should have intended any significant difference in the scope of the federal and D.C. crimes punishing assault upon officers; in the absence of clear evidence of such intent, none should be inferred.

A requirement of force is further suggested by the severity of punishment provided by § 22-505. Violators are subject to a term of ten years imprisonment for assault on a member of the police force with a deadly or dangerous weapon and a term of five years imprisonment or $5,000 fine for assault otherwise than with a deadly weapon. Punishment of five years for acts of remonstrance or other means of non-forceful resistance seems extreme, perhaps bordering on constitutionally verboten territory. This consideration is underscored by a comparison between Section 22-505 and the section immediately preceding it. Section 22-504 outlines a maximum punishment of one year's imprisonment or $500 fine for assaulting a member of the general public. It seems unlikely that the legislature intended to provide for a punishment of one year's imprisonment for forceful interference with a citizen's rights but five years' imprisonment for a non-violent remonstrance directed at an officer. Moreover, a reading contrary to appellant's position imports a sharp inconsistency into the Code between this section and

Section 4-150.*/ There it is provided that "interference" with a member of the police force by certain specified classes of persons will constitute a misdemeanor. If force is not required to satisfy Section 22-505, these same individuals could be severely punished under that felony section for the same acts described in § 4-105 as mere misdemeanors. Unless force is required by Section 22-505, Section 4-150 is both unnecessary and inconsistent with the former section.

In sum, the conclusion that force is a necessary element of the offense charged is dictated by:

(1) the magnitude of the punishment;

(2) the relationship of the crime to adjoining sections requiring force or threatened violence;

(3) the description of the crime by the Congress as assault;

(4) the common law requirement of force as a constituent element of assault;

(5) the absence of cases applying the statute where force is not present;

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*/ Section 4-150 is the last of four sections giving the Board of Commissioners and authorized members of the police force the power of "general supervision and inspection," including inspection of books, pledged property, and premises, over certain classes of citizens. It is clear from the structure of that legislation that the Congress meant to prosecute conduct even though no direct force or assault was the "interference" offered.

(6) the comparison between this section and another section in the criminal code which is inconsistent with this section unless force is required.

(7) the absence of any evidence that Congress intended the District law to materially exceed the scope of the federal law.

B. Even the Misdemeanor of Interference with Police Officers Requires More Than Vocal Displeasure or Remonstrance.

The jury was not instructed that this felony requires a minimum finding that the appellant participated in a direct overt act of interference or obstruction. By even the most expansive construction of Section 22-505 such finding is prerequisite to conviction.

This is illustrated by the cases construing a common law misdemeanor which obtains in some jurisdictions variously titled "obstructing justice" and "interference with police officers." It is universally recognized that even this crime requires a minimum showing of a direct overt act of interference with the police. Force, per se, is "not always"*/ an indispensable ingredient of these offenses although some use of force or

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*/ District of Columbia v. Little, 339 U.S. 1, 6 (1960).

the threat to use it is "generally present";*/ but it is uniformly held that these statutes may not be invoked, even where a mere fine is provided, unless the accused commits an "actual, overt act of obstruction." 3 Anderson, Wharton's Criminal Law, § 1284 (1957 ed.). See also 48 A.L.R. 746; 39 Am. Jur., Obstructing Justice, §§ 8-16. It is further beyond dispute that mere remonstrance does not constitute the crime.**/ This fact is amplified by a Supreme Court decision construing a local regulation. In District of Columbia v. Little, supra, the Supreme Court invalidated a conviction based on a regulation making it a misdemeanor punishable by a fine of no more than $45 to "interfere" with an inspection of premises by authorized inspectors. The respondent returned to her home while an authorized official was standing at her door. Upon being asked to unlock the door for inspection, the defendant "remonstrated" and refused to unlock the door. The Supreme Court ruled that the defendant's conduct did not rise to the level of "interference": "Mere remonstrances or even criticisms of an officer are not usually held to be the

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*/ Long v. U.S., supra, at page 719. See also note, 48 A.L.R. 746.

**/ See 39 Am. Jur., Obstructing Justice, §§ 8-16; Annotation, 48 A.L.R. 746; Annotation, 17 ANN CAS 40; ANN CAS 1914b 1814.

equivalent of unlawful interference."*/ Accordingly, defendant's $25 fine was invalidated.

"Interference" statutes such as those described above must be sharply distinguished from Section 22-505. Assault is mentioned neither in the title nor the text of such provisions. The crime is typically a misdemeanor, providing for punishment far less severe than that outlined in the local statute. The inferference statutes are mentioned here, however, to show that even these statutes which are directed at a lower order of anti-social conduct cannot be invoked in the absence of an overt act of interference. Even if Section 22-505 were given a reading identical with these interference statutes, a conviction could not be sustained in the absence of a showing of an overt act which exceeds mere remonstrance or jeering. This was not explained to the jury.

C. The Failure of the District Judge to Recognize an Essential Element of the Felony Charged Made It Possible For the Jury to Convict Appellant Improperly.

The District Judge's failure to identify the elements of the crime charged in the indictment squarely presents the possibility that the appellant was convicted for conduct which

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*/ 339 U.S. at p. 6.

was not intended to be punished as a felony. On the basis of the evidence introduced the jury might well have concluded that the appellant had been non-cooperative and had made life difficult for the police, and that he accordingly could be convicted even if he were not the one who had jumped Officer Chaillet.

Substantial evidence was introduced concerning the size and demeanor of the crowd which surrounded the officers. It was uncontradicted that the crowd was generally unruly, verbally pelted the officers with obscenities and that the appellant was among this crowd throughout the series of events in question. It was further uncontradicted that the appellant was singled out by the police, both before and during the events in question, as a possible troublemaker. On the contrary, there was considerable dispute as to whether the appellant jumped the officer. It was dark. Both officers had their hands full. Their primary concern was the arrest of Philpot. Admittedly someone jumped Chaillet and frustrated the arrest of Philpot. But was it appellant, the only one in the group of 12 to 15 that the officers happened to know?

The jury may have believed that it was or they may have withheld judgment, deeming it immaterial to the ultimate disposition of the case in light of appellant's admitted membership in the unruly group. It is not fanciful under these circumstances

to conjecture that the jury may have felt that the appellant's conduct was offensive enough to constitute a violation of the statute even if they were not certain that he tackled the policeman. The jury was merely given the literal words of the statute and asked to apply them to the case. Taken literally, apart from their legal contexts, these words could be read to cover almost any sort of disapproving conduct. "Interfere," for instance, literally means inter alia "to take part in the concerns of others";*/ "oppose" can be read to require no more than psychological disapproval, to "resist . . . by arguments, etc.,".**/ There is substantial risk that the jury in this case was thinking more in these terms than in terms consistent with the legal meaning of the terms. While the conduct of the appellant and the other members of the group is hardly to be applauded, the only one that committed a felony punishable by up to five years' imprisonment was the one who jumped Chaillet. The jury should have been so instructed.

The failure on the part of the District Judge to identify with precision the elements of this crime taints

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*/ Webster's New Unabridged International Dictionary, 1959 ed.

**/ Ibid.

the verdict reached by the jury. Critical elements of the crime were directly challenged by the evidence; it cannot be said with assurance that the jury's ignorance of these elements did not have a material bearing on the verdict reached.

Failure to instruct on each element of a criminal offense constitutes reversible error. This court has repeatedly ruled that the trial court must instruct on all essential elements of the charged offense. Tatum v. U.S., 88 App. D.C. 386, 190 F.2d 612 (D.C. Cir. 1951); Byrd v. U.S., supra; Williams v. U.S., 76 App. D.C. 299, 131 F.2d 21 (D.C. Cir. 1942); Jackson v. U.S., 348 F.2d 772 (D.C. Cir. 1965). See also Screws v. U.S., 325 U.S. 91 (1945). It is stressed in these cases that the reading of instructions which do not contain each constituent element is such "fundamental error"*/ as to require reversal even where no objection is given.**/

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*/ Byrd v. U.S., 119 App. D.C. at p. 362.

**/ Trial counsel effectively preserved appellant's objection in this case by requesting that the jury be instructed that the only act described at the trial which constituted assault on a member of the police force was the touching of the officer by whomever accosted him. The District Judge refused this instruction. Even if the point was not sufficiently made below, it could be raised here pursuant to Federal Rule of Criminal Procedure 52(b) by virtue of the cases cited above.

II. The District Judge Erred in Failing to Explain in Terms Understandable to the Jury the Nature of the Act Contemplated by Section 22-505.

With respect to Point II, appellant desires the court to read the following pages of the reporter's transcript: 146-48, 166-68.

Even assuming that neither force nor the threat thereof is a necessary element of this crime, the instructions read by the District Judge are nevertheless so fundamentally incomplete as to require that the conviction be reversed. The District Judge's sole attempt to give meaning to the charging words of the statute consisted of twice reading the verbs contained in the section, and noting that they "were used in the disjunctive". He did not attempt to define any of these charging words. None of the legal constituents of the terms was set forth. No attempt was made to explain the interaction between the terms in words understandable to the jury. Indeed, the District Judge performed more the function of conduit than guide to the meaning of this law.

The court's refusal to explain the meaning of this statute was particularly egregious because of the quantity of legal terms involved and the rather complex relationship existing between them. Each of the six charging terms has legal content; the application of each term has been sharply

limited by the development of elements prerequisite to its use.*/ None of these elements was spelled out. The scope of this statute is further affected by the relationship existing between this section and the adjoining portions of the criminal code. The jury was given no opportunity to understand these matters. By any view, this is a complicated statute. There is a confusion inherent in the six verbs used in the statute; even in their non-legal aspects those terms interact and overlap in ways that only the most sophisticated could be expected to grasp without explanation. The District Judge took the view that he should not explain or define the statutory verbs individually since he did not feel that the court "should require that there be agreement on which one of these six verbs . . . was in fact the offense that they find."**/ So much may be conceded. But, both as a psychological and legal matter the judge erred in ruling that definitions were not necessary in view of the plurality of verbs used. The danger in submitting to the jury one difficult legal word is that they might in their ignorance push the word too far; this

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*/ See 3 Anderson, Wharton's Criminal Law, Ch. 1283-1284 (1957 ed.); 39 Am. J. Obstructing Justice, §§ 8-16; 48 A.L.R. 746.

**/ Tr. 147-8.

danger multiplies geometrically where as many as six complicated terms are submitted and the jury is told merely that they should convict if they find that the appellant's conduct may be characterized by any one of the six vaguely perceived charging verbs.

This jury was given no opportunity to grasp the meaning of § 22-505. Accordingly, it cannot be said with assurance that this conviction represents a reasoned application of the proper law to the facts that unfolded at the trial. A conviction resting on a factual determination that an individual has violated an ill-understood law aggravates the most fundamental notions of the criminal law. If the jury does not understand a law that it is attempting to apply, it must in some form make that law. At this point, the plight of the defendant rests on a value judgment by those who are neither qualified nor authorized to make the judgment. One of the primary aims of the development of a reasoned and civilized criminal law is to prevent precisely this occurrence. The need for intelligent guidance to the jury is accentuated by the circumstances presented here. A brutal crime was committed. The police were thwarted in the performance of their duty. Both the robber and the assaulter escaped. At best, appellant's conduct had been antisocial. There was a

strong emotional urge to punish somebody. Only careful understandable instruction to the jury could prevent a conviction based on general outrage.

This court has long held that a conviction cannot stand where the jury's comprehension of the pertinent statute is in doubt. In Williams v. U.S., 76 App. D.C. 299, 131 F.2d 21 (D. C. Cir. 1942) the defendant was convicted on several counts, including one count of rape. The instructions on rape consisted of no more than mouthing that word to the jury. Rape was "not defined generally much less broken down into its constituent elements."*/ The elements of the crime were not "discussed or defined." The jury was not "told what assault with intent to rape is, nor how it is distinguished from rape" although the judge did tell the jury that it might convict the defendant for assault with intent to rape or simple assault. But the court "wholly failed to tell it [the jury] of what those offenses consisted." This was to put to the jury a multitude of highly clouded notions, none of which could have been fully understood or applied with exactitude:

> "If the jury had known that several crimes with their several factors must come in for consideration and had known the meaning of the factors, such as assault, intent, lack of consent, resistance to the full under the circumstances,

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*/ 76 App. D.C. at p. 300.

> physical force, fear, the necessity of some penetration, it might have concluded that this defendant was not guilty of rape or even of any offense . . . ."

The critical objection, in short, was that the jury was not "informed" of the fundamental concepts underlying these crimes. The jury "could not have applied the reasonable doubt standard" in evaluating the defendant's conduct because they had no clear idea of what that standard was to be applied against. The court concluded: "it can now be clearly seen that to hold this charge sound would be to assume that jurors are wise in the law."*/ This assumption violates "the accepted division of functions between judge and jury" and common experience. The court's concluding remarks are apposite. "But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"

This court has expressed similar sentiments quite recently. In Byrd v. U.S., supra, and Jackson v. U.S., supra, this court expressly ruled that it was not sufficient for the judge to read a criminal statute to the jury unless all of the elements of the crime clearly appeared in the statutory language. The latter case held that the jury was incapable of performing "effectively" and "intelligently" unless it had more of a feel

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*/ 76 App. D.C. at p. 301.

for the statute which it was purportedly applying than could be gained from a mere recitation of the language contained in the Code. See also the views expressed by the Ninth Circuit in Morris v. U.S., 156 F.2d 525 (1946).

Appellant's conviction could stand only if the jury had been instructed in intelligible terms upon each of the elements*/ of the crime described in the statute by the words "assaults, resists, opposes, impedes, intimidates, or interferes with." If robbery and rape are not self-explanatory, as this court has held, clearly the legal significance of these six words cannot be assumed to be within the jury's competence. For example, appellant certainly "opposed" what the officers were doing in the sense that he was "against it" and not in sympathy with it. But such conduct does not constitute a felony punishable by five years' imprisonment, and the jury should have been so instructed.

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*/ See Byrd v. U.S., supra; Screws v. U.S., supra; Williams v. U.S., supra; Jackson v. U.S., supra; Tatum v. U.S., supra. While counsel for appellant did not explicitly request the District Judge to explain each of the charging verbs in § 22-505, he clearly put the District Judge on notice that the charge was incomplete (Tr. 147-148). In any event, as this court has held in the cases cited above, failure to give clear instructions as to the nature of the crime charged constitutes "plain error" under Rule 52(b) and requires reversal even if not brought to the attention of the trial judge.

III. Appellant's Substantial Rights were Affected by the Failure of the District Judge to Limit Reference to Philpot's Brutal Crime and Caution the Jury that it Had Nothing to do with Appellant's Guilt.

With respect to Point III, appellant desires the court to read the following pages of the reporter's transcript: 12, 14, 67-70, 81, 83, 126, 129, 149.

Throughout his examination and closing argument, the prosecutor made repeated reference to the severity of the beating administered by Philpot. On at least seven occasions the prosecutor directed the attention of the jury to the "blood" and "bleeding" occasioned by Philpot's violence.*/

The prosecutor's persistent reference to the gruesome details of the robbery served no purpose in the trial except to incite the jury. The wounds inflicted upon Daughtry, Philpot's victim, were logically irrelevant to the prosecution of the appellant; but the continued reference to the brutality of this crime undoubtedly worked to the considerable prejudice of the appellant. The appellant admitted that he knew and was a friend of Philpot, and that they had been sitting and talking together during the evening in question; the evidence made it

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*/ See the prosecutor's statements at Tr. 14, 81, 83, 129, 149.

appear that they were more or less members of the same "gang". It would be difficult for the jury to confine the emotional antipathy aroused by this crime to the attacker when asked to judge another member of the gang on a separate but nearly simultaneous crime. There is substantial danger where emotional appeals are permitted that the jury will vent their ire on the individual before them whether or not he is responsible for the acts charged. The likelihood of this reaction is greatly magnified once the jury is made aware of the close association existing between alleged culprits of the various simultaneous acts.

Under these circumstances it was "plain error" for the trial judge to fail to limit reference to the specifics of Philpot's crime and to fail to admonish the prosecutor to avoid the subject. This line of questioning was both highly inflammatory and quite irrelevant. The duty of the presiding judge to restrict the proceedings at trial to material relevant to the issues for determination by the jury becomes quite critical where irrelevant but inflammatory and prejudicial material is introduced by the prosecuting attorney. Failure to strike such material goes to the essence of the appellant's right to a fair trial. The courts have frequently recognized the damaging effect of the prosecutor's extraneous appeals.

See for instance, Fuller v. United States, 204 A.2d 812 (1964); Richardson v. United States, 150 F.2d 58 (6th Cir. 1945); United States v. Levi, 177 F.2d 827 (7th Cir. 1949); Viereck v. United States, 318 U.S. 236 (1943). In the latter case the court stated in ruling that the trial judge should have stricken the prosecutor's comments on his own motion:

> ". . . We direct attention to the conduct of the prosecuting attorney which we think prejudiced petitioner's right to a fair trial . . .. In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice . . .. We think that the trial judge should have stopped counsel's discourse without waiting for an objection." (at pp. 247-248).

The appellant is not barred from pressing this error by the failure of trial counsel to object to the conduct of the prosecutor. It is provided in the Federal Rules that "plain errors affecting substantial rights" may be noted on appeal even though proper objections were not taken at trial.*/ In applying this rule the courts have held that an error must be noted on appeal wherever the court cannot say "with fair assurance" that the judgment was not substantially "swayed"

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*/ Rule 52(b). See the cases collected at page 22, supra.

by the error. 4 Barron, Federal Practice, § 2571 (1951 ed.); Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Levi, supra; Campbell v. United States, 85 App. D.C. 133, 176 F.2d 45 (1949). The plain error standard has frequently been applied to require notice of improper and prejudicial comments by the prosecutor in criminal cases. The Supreme Court ruled in Viereck v. United States, supra, that a tardy objection did not bar consideration on appeal since it was plain error for the court to fail to admonish the prosecutor on his own motion. Likewise, the Fuller case held that the failure to strike prejudicial comments by the prosecutor was "plain error" requiring reversal especially where the prosecutor had engaged in an objectionable "course of conduct" throughout the trial. Likewise this court has ruled that Rule 52(b) is "properly asserted" in a case of prejudicial comments by the prosecutor, though denying its application on the facts of that case in part because the trial judge gave "carefully worded instructions" designed to mitigate the force of the comments. Shelton v. United States, 83 App. D.C. 257, 169 F.2d 665 (1948). See also United States v. Levi, supra.

Having erroneously failed to warn the prosecution and the jury when the comments were made, the trial judge further erred in failing to deliver a cautionary instruction

on the immateriality of this evidence. The duty of the trial judge to give cautionary instructions where the conduct of the trial has emphasized confusing or prejudicial matter is well recognized. This court has ruled that a conviction must be overturned where such instructions have been erroneously omitted. Fletcher v. United States, 81 App. D.C. 306, 158 F.2d 321 (1946). A cautionary instruction was the minimum safeguard which this court should have taken to offset the force of prejudicial material. It was indeed plain error for the court to have altogether failed to issue any warning about the immateriality of such evidence. Philpot's brutal crime, his bleeding victim, his escape and his prior association with appellant were essential elements of the case put to the jury by the prosectuion. They could not help but have influenced the jury -- against appellant. Yet they had nothing to do with his guilt and the jury should have been so cautioned.

Conclusion

For the foregoing reasons, appellant submits that his conviction must be reversed and the case remanded for a new trial.

Respectfully submitted,

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April 5, 1966

REPLY BRIEF FOR APPELLANT FRANKLIN E. MOYLER

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

FRANKLIN E. MOYLER,
Appellant,

v. No. 19,910

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Circuit

FILED MAY 1 1966

CLERK

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,910

Franklin E. Moyler, Appellant

v.

United States of America, Appellee

REPLY BRIEF FOR APPELLANT

Appellant has been convicted and sentenced to nearly four years' imprisonment for the crime of "Assault On A Member of the Police Force". The appellee seeks to sustain his conviction on the ground that "appellant could have been guilty of the offense either as a member of the crowd (as he admitted) or as the attacker." (Appellee's Br., p. 6.) It is appellant's position that membership in the crowd that gathered round the arresting Officers provided no basis for his conviction of the crime charged, and that the jury should have been so charged.

There was a sharp conflict in the testimony as to whether the appellant was the attacker of Officer Chaillet. The Officers testified that it was appellant and not some other

member of the crowd that tackled Officer Chaillet.*/ Appellant and an eyewitness, Joseph Miller, vigorously denied this. It was precisely this dispute which should have been resolved by the jury. The fundamental and prejudicial error committed by the District Judge was his failure to charge the jury that they could convict the appellant of this crime only if they were satisfied that he had in fact tackled the Officer. Unless the appellant attacked Officer Chaillet, there is literally no evidence that he used or threatened the use of force. It is appellee's essential position, however, that the absence of force is immaterial because, it is claimed, the use or threat of force is not a necessary element of the crime "Assault On A Member of the Police Force". This is the basic issue on this appeal.

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*/ Officer Chaillet testified that the attacker wore a "short-sleeved, open-collared flower-designed shirt, predominant color as I recall was yellow, with khaki trousers and hard-topped, wing-tipped shoes." Tr. 31. In strikingly similar language, though the Officers had not discussed the matter, Officer Catalano testified: "He was wearing khaki trousers, khaki-colored trousers, and a short-sleeved sportshirt. It was a flowered shirt, multicolored flower shirt that was predominantly yellow." Tr. 47. Appellant testified that he was wearing a blue shirt and black trousers. Tr. 158.

I. The Use or Threat of Force is an Essential Element of Assault On A Member of the Police Force.

Section 22-505, which defines this crime, and the four preceding sections of the District of Columbia Criminal Code deal exclusively with types of criminal assault, the elements of which have been established for centuries; the sine qua non of the crime both at common law and in all modern American jurisdictions is a showing of force or threatened force. 1 Anderson, Wharton's Criminal Law and Procedure, §§ 329-336 (1957). Criminal assault in the District of Columbia incorporates the common law assault elements. See Guarro v. United States, 99 U.S. App. D.C. 97, 237 F.2d 578 (D.C. Cir. 1956); Harris v. United States, 201 A.2d 532 (D.C. Mun. Ct. App. 1964). There is no evidence that Congress intended to sweep into the particular type of assault defined in Section 22-505 mere passive acts of remonstrance. The assault provisions are contained in the chapter of the Code which deals exclusively with serious and violent felonies. Moreover, "Assault On A Member of the Police Force" is an especially serious offense; it is a felony punishable by up to 10 years' imprisonment if a weapon is employed, otherwise 5 years.

Appellee first contends that "force" is not an element of the crime because that word does not appear in the statutory language. (Appellee's Br., p. 7.) It is not typical in this or other modern jurisdictions for the legislature to adumbrate each of the elements of the various crimes -- particularly the common law crimes -- in the criminal code books. Indeed, none of the District of Columbia assault provisions mentions the requirement of force in the statutory language; but it is acknowledged that force is a requisite of the crime of assault in the District of Columbia. Guarro v. United States, supra; Harris v. United States, supra. Indeed, this Court has expressly ruled that the identification of a common law crime in a criminal statute evidences an intention to receive all of the elements of the crime into the law of the jurisdiction. See Byrd v. United States, 119 App. D.C. 360, 342 F.2d 939 (D.C. Cir. 1965); and Neufield v. United States, 73 App. D.C. 174, 188 F.2d 375 (D.C. Cir. 1941). Moreover, appellee's argument is further undermined by its own listing of the "constituent elements" of § 22-505, differing in material respects from the precise language of the statute. (Appellee's Br., p. 9.)

Appellee next contends that the contrast between the District of Columbia Code and the analogous federal statute dictates the conclusion that the omission of the word "force" in the local act represents a legislative intention to broaden the crime beyond the scope of the federal statute. It does not attempt to explain why the Congress should have intended this material difference in the scope of the federal and District of Columbia crimes proscribing assault upon officers. Nor was the appellee able to refer to any evidence in the legislative history supporting its contention that the act was expressly designed to exceed the scope of the federal statute.*/ Indeed, as shown in appellant's opening

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*/ Appellee concedes that the legislative history is "generally inconclusive" but nonetheless asserts that it manifests "a congressional intent to broaden the offense." (Appellee's Br., p. 3.) Nowhere in the debates or the committee reports is it suggested that the purpose of § 22-505 was to "broaden" the scope of the crime. Each of the committee reports which preceded the final passage of the act in 1953 stressed that there were but two purposes for the amendment to this assault provision: (1) to step up the punishment for assault on a police officer from a misdemeanor to a felony; (2) to provide more severe punishment for assault with a dangerous weapon. See H.R. Rep, 514, 83d Cong., 1st Sess., 6 (1953); S. Rep. 364, 83d Cong., 1st Sess., 6 (1953).

(footnote continued)

brief, the legislative history reads precisely to the contrary. The phrase "without justifiable and excusable cause" was substituted for the word "forcibly" in the final draft immediately prior to passage after sharp criticism that the former draft was too broadly drawn. Never throughout the entire legislative history did anyone suggest that force was not or should not be an element of the crime.

Finally, the Government refers to a line of cases which "generally" hold that the statutory crime of "resisting" or "opposing" or "interfering with" an officer does not require "the employment of actual violence or direct force." (Appellant's Br., p. 8.) But such cases do not establish the constituent elements of the felony "Assault On A Member of the Police Force". These "interference" statutes differ materially

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(Continuation of footnote)

Appellee further contends that an argument "strikingly similar" (Appellee's Br., p. 8) to that submitted by the appellant in this case was rejected in the Municipal Court of Appeals in United States v. Caviness, 192 A.2d 288 (Mun. Ct. App. D.C. 1963). But the issue in that case was whether Section 22-505 outlawed an attempted assault. The Court held that it did; it was not called upon to consider, and did not consider, the significance of the omission of the word "forcibly" in the District of Columbia statute.

from the D.C. "assault" provision in title, degree of punishment and statutory context. The District of Columbia provision focuses on assault; none of the "resistance" statutes mention assault in either the title or the text. The District of Columbia Code establishes assault as a felony punishable by five years' imprisonment; but the interference statutes are typically misdemeanors -- often only a small fine is provided.

Moreover, even if the minimum elements of the crime of interference are identical with the elements of the local assault provision, the authorities cited by the appellee warrant reversal of this conviction. Each authority mentioned by the Government expressly provides that a direct overt act of interference or resistance is the minimum constituent of the crime.*/ Appellee attempts to avoid the cases collected in these authorities by stating:

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*/ The rule as stated in 48 A.L.R., cited by appellee, is:

> "Remonstrating with an officer on behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer (citations omitted)." At p. 753.

See also District of Columbia v. Little, 339 U.S. 1 (1950); 17 Ann. Cas. 40, 39 Am. Jur. Obstructing Justice § 10; 3 Anderson, Wharton's Criminal Law § 1284 (1957 Ed.).

> " . . . whether the jury believed the witnesses for the Government or for the defense, it could find only that appellant's action went far beyond 'mere remonstrances of even criticism.'" (at p. 6.)

The short objection is that there was absolutely no evidence that appellant's conduct exceeded remonstrances unless he jumped the Officer. There was no evidence of any overt act other than the attack on Officer Chaillet.*/

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*/ Appellee's attempt to prove that the appellant's conduct exceeded remonstrance or criticism consisted of the following offers at page 6: (1) "Appellant slipped by [Officer Catalano] and jumped on Officer Chaillet's back." If this is so, appellant has committed the charged offense. But the appellee begs the question by using this evidence to prove that the appellant has committed this crime even if appellant's witnesses are believed; (2) "This crowd closed in on [Officer Chaillet] and his partner." There is no evidence that appellant "closed in" on the officers. Moreover, the authorities cited by appellant clearly state that merely gathering around the scene of a crime is not sufficient to constitute the misdemeanor of interference with or resisting officers; (3) "The mob shouted obscenities and urged each other to 'get the cop's gun' and 'take the cop's prisoner away from him.'" Mobs do not shout obscenities; individual members of the mob may. Appellant denied shouting obscenities; and there was no contrary evidence. Moreover, appellee's authorities explicitly deny that shouting obscenities is sufficient to constitute the crimes listed and further deny that one member of a crowd witnessing an arrest is criminally responsible for the acts of another; (4) "The mob threatened . . ." There is again no evidence that appellant said anything or in any manner "threatened the officers." In short, even if the acts mentioned by the appellee transcend remonstrance or criticism, there was no evidence that appellant participated in these acts.

II. The Court Should, In Any Event, Have Instructed the Jury As to the Meaning of the Statute.

As indicated in appellant's opening brief, the instructions were so fundamentally incomplete as to require reversal even if force or an overt act of obstruction are not requisite elements of the crime (pp. 23-28). This Court has repeatedly ruled that the mere recitation of the statutory language is not a sufficient instruction unless each of the elements of the crime is described in the statute in a way that can be readily understood by the laymen on the jury. The statute involved in this case is subtle and intricate and should have been explained in lay terms.

The Government challenges the application of this principle here since "all of the words in question have common meaning within the easy grasp and understanding of the layman, and, with the exception of 'assault', there is no special meaning attached to the words." (Appellee's Br., p. 9.) But to the extent that these words do have "common meaning,"*/ this meaning is quite inconsistent with their

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*/ For instance, the common meaning of "resist", as reflected in standard dictionaries, is: "To withstand . . . to oppose by physical, mental or moral powers; to strive against." "Oppose" means: "to put in opposition; to set against . . .; to offer antagonistically, as an opinion; to resist or antagonize whether by physical means or argument." Webster's New International Unabridged Dictionary, 2d Ed., 1954.

legal meaning in the statute. District of Columbia v. Little, supra, cited by appellee, presents a case precisely in point. The defendant was fined $25 for "interfering" with a building inspector when she railed against the inspector and refused to open her door for him. While this conduct is surely encompassed by the "common" and dictionary meaning*/ of "interfere", the Supreme Court ruled that this was not "the kind of interference"**/ at which the law was directed; for legal purposes "interfere" contemplates far more offensive conduct. In addition, the other authorities cited by the appellee show that verbally castigating police officers and other forms of remonstrance do not -- for legal purposes -- constitute "opposing" or "resisting" or "intimidating" officers. Here again the legal meaning is more closely drawn than the "common meaning" of the words.

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*/ Interfere means, inter alia: "To be in opposition; to enter into, or take part in the concerns of others; to intermediate; to interpose." Webster's New International Dictionary, 2d Ed., 1954.

**/ At p. 12.

Appellee argues that "the trial judge has a duty to guide the jury into the intricacies of the law -- hs is not a dictionary." (Appellee's Br., p. 9.) It is difficult to understand what comfort appellee derives from this description of the "duty" of the trial judge. In this case the District Judge made no attempt to give legal "guidance" to the meaning of the charging words in the statute. The statute does present "intricacies of law"; assault is conceded to be a "legal" term and the remaining five verbs have been sharply qualified by courts in all jurisdictions having "interference" provisions.

The problem presented is that some of the words used in the District of Columbia statute do have a common meaning; the danger is that the common meaning of these words may well have been applied by the jury since they were given no guidance from the District Judge as to the legal scope of the statute.

III. The Failure of the Court to Caution the Jury that Appellant Had No Responsibility for Philpot's Brutal Crime was Plain Error.

A central theme of the case presented by the prosecution was the severity of the beating administered by Philpot to his victim. Appellee attempts to justify the persistent

use of the details of this crime by contending that the introduction of this evidence was necessary to make out "an essential element" of the crime charged. (Appellee's Br., pp. 10-11.) Admittedly the prosecution was required to show that the Officer was performing his duty when he was assaulted. But this fact, never disputed, was established beyond doubt early in the trial when Daughtry, the victim, testified that the Officers' presence was explained by their observation of Philpot's attempted robbery. Tr. 13. Both Officers reinforced this story; this evidence was never contradicted. The exaggerated and repeated use of the terrifying details of Philpot's crime was wholly irrelevant to the "essential element" mentioned; surely official duty does not begin only when a robber draws blood.*/

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*/ Appellee's attempt to explain the repeated use of this evidence is wide of the mark. Appellee makes no attempt to explain the references in the prosecutor's closing argument; it is apparently conceded that the sole purpose of introducing the evidence at this point was to influence the jury. Appellee does, however, attempt to explain the other references to Philpot's violence by stating that the only reference to Mr. Daughtry's "bleeding" during the presentation of the "Government's case in chief" was when the victim himself testified. But even at that point the Government had to elicit this information from Mr. Daughtry; the prosecutor specifically asked, "Were you bleeding?" Tr. 14. The Government does not attempt to explain why this was material. Appellee further

(footnote continued)

Appellee further attempts to justify the repeated reference to the robber's escape by stating that the escape was "of paramount importance" in establishing the Government's case; the escape "showed interfering" and "impeding -- both elements of the crime."*/ (Appellee's Br,, p. 11.) Appellee calls attention to no authority, however, holding that "assault" or even "interference" with an officer depends on the success of the attack. Indeed, the appellee relies on one recent case in this jurisdiction which holds precisely to the contrary.**/

(Continuation of footnote)

states that the victim's wounds were emphasized during cross-examination "for the purpose of impeaching the testimony of defendant and his witness." This evidence purportedly impeaches the appellant's testimony because although he was at the scene he did not see the "bloody victim" while the victim was sitting in the police car. It is not explained how the fact that he was bleeding relates to impeachment.

*/ This contention is flatly inconsistent with appellee's contention that the charging words in § 22-505 required no explanation by the District Judge since each word has a common meaning and is to be given an interpretation by the jury consistent with that meaning. Surely the common meaning of these two words would extend to disruptive conduct which falls short of altogether aborting the Officers' efforts.

**/ United States v. Caviness, supra, cited at p. 8 of Appellee's Brief.

Appellee concludes that: "Of course these facts influenced the jury against the appellant. All evidence tending to prove the elements of an offense has that result." (Appellee's Br., p. 11.) What the appellee fails to mention is that evidence which does not tend to prove the elements of an offense can also influence the jury. In this case the evidence submitted and stressed by the prosecution went far beyond the establishment of the Government's case and worked to the material prejudice of the appellant.

Conclusion

Appellant's conviction should be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

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May 17, 1966

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,910

FRANKLIN E. MOYLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 12 1966

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Cr. No. 1002-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did the trial judge's failure to instruct the jury that "force" is a necessary prerequisite for an assault on a member of the police force (22 D.C. Code § 505) constitute plain error when the statute does not require force and when the jury could have found a violation of the statute whether it believed appellant's version or the Government's version of the incident?

2) Was it plain error for the judge to use the statutory language in his instructions when that language required no special legal interpretation and had an obvious meaning within the easy grasp and understanding of an average person?

3) Was it plain error for the judge to fail to caution the jury to disregard references by the prosecutor to a crime which occurred just before and gave rise to the charged assault, when those references showed only elements of the charged offense and appellant's motive for the assault?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,910

FRANKLIN E. MOYLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was tried before a jury on a two-count indictment charging him with assault on two policemen (22 D.C. Code § 505). The jury found him guilty on one count and he was sentenced to a prision term of 15 to 45 months.

During the early morning hours of July 4, 1965, Officers Chaillet and Catalano of the Metropolitan Police were cruising in an unmarked patrol car along First Street, Northwest. Around 1:45 a.m., as they neared the intersection at Rhode Island Avenue, the officers observed

a robbery in progress. They saw a person identified as Philpot assault and rob Clayton Daughtry, who was walking next to a church on First Street. To cut off the robber's escape, Officer Chaillet drove the patrol car across the curb and onto the sidewalk. He slammed on the brakes and threw open his car door so that it knocked the robber to the sidewalk. Officer Catalano jumped out and rushed around the patrol car to apprehend Philpot, who had gotten to his feet and was attempting to escape. Officer Chaillet then took charge of Philpot, and Catalano retrieved a stolen wallet from the sidewalk where Philpot had dropped it. He also put the robbery victim into the patrol car. (Tr. 11, 16-17, 36-37.)

Chaillet started to handcuff the prisoner who was attempting to escape and shouting that he did not do anything. Both officers testified that the victim and his assailant were the only persons in the immediate vicinity of the robbery, but that a number of people were sitting outside one of the row houses down the block. Within seconds, however, a large crowd of angry, shouting by-standers gathered around the two officers and their prisoner. Officer Chaillet was wrestling with the prisoner on the church steps, still trying to put handcuffs on him. Officer Catalano stood in front of the two combatants in an effort to keep the angry mob from interfering. He told the by-standers to disperse before they got involved; however, the crowd closed in on him, shouting obscenities and urging each other to get the officers' guns and release the prisoner. (Tr. 17-19, 25, 37-38, 42.)

Officer Catalano easily recogized appellant as one of the by-standers, because appellant was conspicious in his flowery, bright yellow sport shirt. (Tr. 31, 47). Also, both officers knew appellant and had spoken with him less than an hour before this incident (Tr. 20, 28, 40). As the mob closed in, appellant slipped by Catalano and jumped on Chaillet's back (Tr. 19, 38). Catalano was too preoccupied with keeping the crowd back to stop him but he saw appellant hitting and kicking his partner (Tr. 38). Philpot took advantage of this assistance by escaping from Chaillet. Catalano pursued the escaping

prisioner but soon gave up the chase and returned to help Chaillet, who, meanwhile, had grabbed his tormentor and was rolling on the ground with him. Chaillet was positive of his identification of appellant as the person who had jumped him. He also testified that appellant and at least one other by-stander tried to grab his service revolver out of its holster. (Tr. 18, 38, 26-27.)

Despite assistance from Catalano, appellant also escaped and ran into the same row house where everyone had been sitting before the incident. Chaillet was in close pursuit but was unable to apprehend appellant. When Chaillet later checked the yard behind the row house, he heard a noise and flashed his light into the face of appellant, who was inside the house trying to open a back window. Appellant swore at Chaillet, who ran around to the back door and entered the house again in an effort to arrest appellant. But again appellant disappeared and he was not arrested until much later pursuant to a warrant. (Tr. 29, 32-33, 39.)

Appellant admitted that he stood by while the whole incident occurred but claimed that he did nothing. He alleged that Officer Chaillet came over to him after Philpot had escaped and told him that he was under arrest. Then without touching Chaillet or Catalano, appellant testified, he ran away and hid on the roof of the row house while the officers searched for him. (Tr. 60-63.)

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 505, provides in pertinent part:

> (a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 111, provides in pertinent part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

SUMMARY OF ARGUMENT

I

"Force" is not a necessary prerequisite for an assault on a member of the police force, because the statute (22 D.C. Code § 505) does not require it. On the other hand, the comparable federal statute (18 U.S.C. § 111), makes specific reference to "force", so appellant's reliance on that law and on cases interpreting that law is not relevant. The legislative history, although generally inconclusive, indicates only a congressional intent to broaden the offense and to increase the penalty. However, these considerations are really academic, because "force" was evident in this case whether the jury believed appellant's version or the Government's version of the incident. Appellant admitted being in the angry mob that was threatening and closing in on the police, who were trying to arrest one of appellant's friends. This fact, alone, could have constituted a violation of 22 D.C. Code § 505. But the jury evidently required somewhat more force, because it rejected an assault count involving the officer who was trying to hold back the mob, while convicting appellant

for assault on the officer who was attacked. Thus there was no plain error, if any, in the trial judge's failure to instruct that "force" is an element of the charged offense.

II

Appellant's claim of plain error in the judge's failure to define the words of the statute, "assault, resist, oppose, impede, intimidate, and interfere," must be rejected because the words all have ordinary meanings within the understanding and grasp of the layman. The judge's only duty is to instruct on the intricacies of certain legal terms.

III

There was also no plain error in the judge's failure to caution the jury regarding references to the crime that gave rise to the assault in this case. That crime and the officers' reaction to it constituted an element of the charged offense, namely, that the officers were performing their official duties when the assault took place. Other references to the first crime and to the victim of that crime were made for impeachment purposes, to show motive for the charged offense, and to reflect other elements of the charged offense. All references were necessary for the Government's case.

ARGUMENT

I. Assault on a policeman (22 D.C. Code § 505) does not require "force".

(Tr. 14, 18, 20, 26, 37-39, 88-89, 128-131, 144, 147, 171)

The Supreme Court has recognized that "force or threatened force is not always an indispensible ingredient of the offense of interfering with an officer. . ." *District of Columbia* v. *Little*, 339 U.S. 1, 6 (1950). But the offense does require more than "mere remonstrances or even criticisms." *Ibid.* The facts of this case reflect a

most serious situation that far transcended "remonstrances" or "criticisms" (See Tr. 18, 20, 26, 37-39, 144):

Within seconds after Officers Chaillet and Catalino made an arrest, an unruly mob had surrounded them. As Officer Chaillet struggled to handcuff his prisoner, this crowd closed in on him and his partner. The mob shouted obscenities and urged each other to "get the cop's gun" and "take the cop's prisoner away from him." As the mob threatened and surged toward him, Officer Catalino was admittedly frightened, but he tried to keep them back. However, appellant slipped by him and jumped on Officer Chaillet's back. This action permitted the prisoner to escape and Catalino tried—but failed—to capture him. Catalino returned to the crowd to find his partner and appellant struggling on the ground. Others in the crowd were trying to get Chaillet's service revolver from his holster. Despite Catalino's efforts to help, appellant also escaped and was not arrested until later.

Appellant admitted being in the crowd, admitted the crowd was moving in on the police, but denied attacking Chaillet (Tr. 60-63, 88, 90). Appellant's witness also admitted being among the by-standers, admitted they were shouting obscenities at the police, but also denied that appellant was the attacker (Tr. 128-131). Four of the five witnesses in the trial acknowledged that someone did attack Chaillet (Tr. 14, 20, 38, 131); only the fifth witness—appellant himself—"didn't see anyone" attack the officer (Tr. 89).

It is clear that whether the jury believed the witnesses for the Government *or* for the defense, it could find only that appellant's actions went far beyond "mere remonstrances or even criticisms." Appellant could have been guilty of the offense *either* as a member of the crowd (as he admitted) *or* as the attacker. The jury, however, evidently chose to require more than the force exerted by the crowd in this case, because it found appellant

not guilty of assaulting Officer Catalano, who was trying to hold back the crowd.

Appellant now urges plain error because the trial judge did not instruct the jury that "force" is an essential element in the crime of assaulting a policeman.[1] However, the statute in question (22 D.C. Code § 505) makes no reference to force. It merely proscribes actions by anyone who assaults *or* resists *or* opposes *or* impedes *or* intimidates *or* interferes with an officer engaged in his official duties, unless there is just or excusable cause for the actions. On the other hand, the comparable federal statute (18 U.S.C. § 111), which is the basis for the cases upon which appellant relies, specifically begins, "Whoever *forcibly* assaults. . ."

The statute is clear on its face, so there is no need to go into its legislative history.[2] The question is only

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[1] Appellant is forced to rely on plain error under Rule 52(b), F.R. Crim. P., because his trial counsel did not request such an instruction. Rule 30, F.R. Crim. P. His counsel did object to the judge's failure to instruct the jury that it must find a "touching" before convicting appellant; however, that objection went far beyond his contention on this appeal (Tr. 147, 171).

[2] This Court has stated,

> "* * * It is elementary in the law of statutory construction that, absent ambiquity or an absurd or unreasonable result, the literal language of a statute controls and resort to legislative history is not only unnecessary but improper." *Elm City Broadcasting Corp.* v. *United States*, 98 U.S. App. D.C. 314, 319, 235 F.2d 811, 816 (1956).

But even if it were necessary, the inconclusive legislative history of this law was accurately described by the District of Columbia Court of Appeals:

> "Prior to 1953, Sec. 22-505, applied only to those who used 'personal violence' upon any member of the police force. A subcommittee of the House Committee on the District of Columbia expressed concern over the frequent attacks upon police officers by persons taken in custody. H.R. Rep. No. 3244, 81st Cong., 1st Sess. 29 (1951). In 1953 Sec. 22-505 was amended to its present language as part of the District of Columbia Law Enforcement Act of 1953. A review of the hearings and report on the Law Enforcement Act affords no clue as to the reasons for the omis-

one of statutory interpretation—a question which has already been answered:

> "As a general rule, under statutes containing the words 'obstruct, resist, or oppose," or "resist, obstruct, or abuse,' or the single word 'resist,' the offense of resisting an officer can be committed without the employment of actual violence or direct force, and without making threats." 39 Am Jur, Obstructing Justice, § 10. Accord 48 A.L.R. 746; 17 Ann. Cas. 401 (1910).

From this it should be quite clear that indirect and nonforceful actions could constitute an offense under 22 D.C. Code § 505, so the judge was correct in not instructing the jury that "force" is a necessary element of the offense.[3]

However, the issue is academic in this case because force was obviously used by appellant. There was no plain error affecting his substantial rights. Indeed, there was no error.

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sion of the words, 'uses personal violence.' *United States* v. *Caviness*, 192 A.2d 288, 289 (Mun. App. D.C. 1963).

The Court in *Caviness* went on to hold that, since "attempted assault" was already a specified crime under 22 D.C. § 505, the lower court correctly dismissed a 22-103 information charging a defendant with attempted assault on an officer. The court rejected an argument by the Government which was strikingly similar to that propounded by appellant in this case. It also presumed for its opinion that "Title 18, § 111 of the U.S. Code is analogous to Sec. 22-505 of the D.C. Code, *except for the element of force . . .*" (Emphasis added.) *Ibid.*

[3] Of course the judge could have instructed the jury in the same language used by a Massachusetts court in 1854:

> "Any obstruction to the free action of the officer . . . is sufficient. And it is clear, that, if a multitude of persons should assemble, even in a public highway, with the design to stand together and thus prevent the officer from passing freely along the way . . . this would, of itself, and *without any active violence*, be such an obstruction as is contemplated by law [prohibiting the knowing or wilful obstruction, resistance, or opposition to any officer in the performance of his duties]." (Emphasis added.) *In re Charge to Grand Jury*, 30 Fed. Cas. 983, 984, 2 Curt. C.C. 637, Fed. Cas. No. 18,250 (1854).

II. The jury instructions sufficiently explained all elements of the charged offense.

(Tr. 167)

The trial judge succinctly listed all of the constituent elements of the charged crime in his instructions to the jury:

> "The elements of this offense which you must find in order to find that the Government has proved beyond a reasonable doubt this charge are as follows: (1) that the complaining witness was a police officer; (2) that the defendant knew he was a police officer; (3) that the complainant was engaged in the performance of his duties; (4) that the defendant, assaulted, resisted, opposed, impeded, intimidated, or interfered with the complainant.
>
> * * * *
>
> (The judge explained that the six verbs included in the fourth element, above, were in the disjunctive and that the Government need not prove all of them.)
>
> "(5) That such action was without justifiable or excusable cause." (Tr. 167.)
>
> (The judge then went on to expand on each of the five elements. In his discussion of the fourth element above, he simply said that he would not discuss the evidence supporting each of the six verbs because the testimony was so recent. He did repeat the six verbs thrice more.)

Appellant contends that a jury could not be expected to understand the meaning of the words "assaulted, resisted, opposed, impeded, intimidated [and] interfered", so he asserts plain error in the judge's failure to explain their meaning. All of the words in question have common meanings within the easy grasp and understanding of a layman and, with the exception of "assault", there is no special legal meaning attached to the words. The trial judge has a duty to guide the jury into the intricacies of the law—he is not a dictionary. See *Byas* v. *United*

States, 86 U.S. App. D.C. 309, 182 F.2d 94 (1950). There was no plain error.

III. No inflammatory remarks were made by the prosecution.

(Tr. 60, 83, 163, 165, 168, 170)

The so-called "inflammatory" remarks by the Assistant United States Attorney—remarks which went completely unnoticed at trial—were merely references to the incident that gave rise to the angry mob scene and charged assault in this case. On page 33 of his brief, appellant concludes:

> "Philpot's *brutal crime*, his *bleeding victim, his escape* and *his prior association* [*with appellant*] were essential elements of the case put to the jury by the prosecution. They could not help but have influenced the jury—against appellant. Yet *they had nothing to do with his guilt. . . .*" (Emphasis added.)

The crime of assaulting an officer does not take place in a vacuum, yet appellant's objection here would seem to make that assumption. Evidence of the "brutal crime" which occurred before the officers' eyes and before all of the other witnesses showed that the officers were engaged in the lawful performance of their official duties. To ignore this fact would be tantamount to ignoring that element of the charged offense.

The "bleeding victim" was also vital evidence. He was on the scene the entire time, yet appellant claimed not to have seen him. The only reference to "bleeding" during the Government's case-in-chief was made when the victim himself testified—and then he was asked but one question to establish whether he was bleeding after the assault and robbery. References were made during the cross-examination of appellant and his witness, but only for the purpose of impeaching their testimony.[4] More-

[4] Appellant testified that he never saw any victim—even though he stated he was standing by the patrol car in which the bloody

over, the existence of a bleeding victim on the scene should have stopped appellant and the mob from their actions—but it did not.

Appellant's "prior association" with Philpot (the man whom the officers were attempting to arrest) was also vital evidence. It gave the jury appellant's *motive* for assaulting the officer.

The robber's "escape" was likewise of paramount importance to the Government's case. It showed that appellant's assault on the officer was successful. It showed an "interfering" and an "impeding"—both elements of the crime. Furthermore, it showed an aggravated situation which warranted the charges against appellant.

Of course these facts "influenced the jury against appellant." All evidence tending to prove the elements of an offense has that result. And appellant's allegation that these facts "were essential elements of the case put to the jury by the prosecution" is also correct. They were.

But the prosecution did not dwell on these matters at any time during the trial. There was no prejudicial repetition of "blood" or "bleeding victim" and the trial judge would certainly have cautioned the jury if there had been. The challenged facts were an important part of the Government's case and were necessarily before the jury. Indeed, the trial judge would have acted rashly if he had cautioned the jury to disregard references to the robbery. The judge did make it manifestly clear to the jury that it was to consider only the charges in the indictment (Tr. 163, 165, 170), and he put the first crime in its right perspective by instructing the jury that it was uncontradicted proof of element number three—that the officers were performing their official duties at the time (Tr. 168). There was never an insinuation that appellant was connected in any way with the perpetration of Philpot's crime. There was no plain error, if any.

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victim was seated (Tr. 60, 83). Appellant's witness, who was also part of the mob, testified that he saw the victim but denied seeing any blood.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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